U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 December 2006

CASE NO.: 2005-BLA-5256

In the Matter of:

R. W. B.,
Claimant

v.

COPPERAS COAL CORPORATION,
Employer

and

WV CWP FUND,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

S. F. Raymond Smith, Esq.,
For the Claimant

Chris Hunter, Esq.,
For the Employer

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a miner's duplicate claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*, as amended ("Act"), filed on December 9, 2003. The act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;
2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,
3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal workers' pneumoconiosis" ("CWP")) as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The claimant filed his prior claim for benefits on November 2, 1998. (Director's Exhibit ("DX") 1). On August 31, 2001, the Benefits Review Board issued a Decision and Order affirming the Administrative Law Judge's opinion. Administrative Law Judge Lesnick found that Claimant has coal workers' pneumoconiosis, but was not totally disabled. Therefore, benefits were denied. (DX 1).

The claimant filed his claim for benefits on December 9, 2003. (DX 3). On August 13, 2004, the claim was approved by the district director because the evidence established the elements of entitlement. (DX 21). Thereafter, the Employer requested a formal hearing before the Office of Administrative Law Judges. (DX 22).

On May 11, 2006, I held a hearing in Beckley, West Virginia, at which the claimant and employer were represented by counsel.[1] No appearance was entered for the Director, Office of Workman Compensation Programs (OWCP). The parties were afforded the full opportunity to present evidence and argument. Claimant's exhibits ("CX") 1-2, Director's exhibits ("DX") 1-28, and Employer's exhibits ("EX") 1-5[2] were admitted into the record. Claimant and Employer submitted closing arguments post-hearing.

ISSUES

I. Whether the miner has pneumoconiosis as defined by the Act and the Regulations?

II. Whether the miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner is totally disabled?

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[1] Under *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1998)(en banc), the location of a miner's last coal mine employment, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction. Under *Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989), the area the miner was exposed to coal dust, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction.

[2] Employer's exhibit 6, an X-ray interpretation, was not admitted due to exceeding the evidentiary limitations. 20 C.F.R. §725.414. (TR 17).

IV. Whether the miner's disability is due to pneumoconiosis?

V. Whether there has been a change in an applicable element of entitlement upon which the order denying the prior claim became final?

FINDINGS OF FACT

I. Background

A. Coal Miner

The claimant was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for at least 18 years.

B. Date of Filing

The claimant filed his claim for benefits, under the Act, on December 9, 2003. (DX 3). None of the Act's filing time limitations are applicable; thus, the claim was timely filed.

C. Responsible Operator[3]

Copperas Coal Corporation is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart G, Part 725 of the Regulations.

D. Dependents[4]

The claimant has one dependent for purposes of augmentation of benefits under the Act, his wife. Claimant has been married since April 19, 1975. (DX 3; DX 9).

E. Personal, Employment and Smoking History[5]

The claimant was born on December 18, 1955. He is currently married. The claimant's last position in the coal mines was that of a roof bolter. Claimant's position required heavy lifting and hours of standing and crawling.

There is evidence of record that the claimant's respiratory disability is due, in part, to his history of cigarette smoking. Claimant is a current smoker and has smoked for the past 30 years. His level of smoking has varied from a half a pack a day to as much as a pack and a half per day.

[3] Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator. 20 C.F.R. § 725.493(a)(1) defines responsible operator as the claimant's last coal mine employer with whom he had the most recent cumulative employment of not less than one year.
[4] See 20 C.F.R. §§ 725.204-725.211.
[5] "The BLBA, judicial precedent, and the program regulations do not permit an award based solely upon smoking-induced disability." 65 Fed. Reg. 79948, No. 245 (Dec. 20, 2000).

II. Medical Evidence

I incorporate by reference the summary of evidence contained in Judge Lesnick's Decision and Order Denying Benefits. (DX 1). The following is a summary of the evidence submitted since the final denial of the prior claim.

A. Chest X-rays[6]

There were eight readings of three X-rays, taken on February 18, 2004, June 9, 2004 and July 20, 2004. Three are positive, by three physicians, Drs. Patel, Cappiello and Ahmed, who are Board-certified in radiology and B-readers.[7] Five are negative, by four physicians, Drs. Binns, Wiot, Castle and Spitz, all of whom are either B-readers, Board-certified in radiology, or both.

Exh. #	Dates: 1. X-ray 2. Read	Reading Physician	Qualifications	Film Quality	ILO Classification	Interpretation Or Impression
DX 11	2/18/2004 2/23/2004	Dr. Patel	B, BCR	3	1/1	p/p. all zones.
DX 11	2/18/2004 3/13/2004	Dr. Binns	B, BCR	1		Quality only reading.
DX 12	2/18/2004 4/19/2004	Dr. Binns	B, BCR	3 Dark	0/1	s/p. all zones. No active disease.
EX 2	6/9/2004 4/11/2006	Dr. Wiot	B, BCR	2		Negative
EX 1	6/9/2004 4/14/2006	Dr. Castle	B, BCI(P)	3 underexposed		Negative.
CX 1	7/20/2004 7/23/2004	Dr. Cappiello	B, BCR	1	1/1	p/s. all zones.
CX 2	7/20/2004 7/29/2004	Dr. Ahmed	B, BCR	1	1/1	p/s. all zones.
EX 2	7/20/2004 4/12/2006	Dr. Wiot	B, BCR	1		Negative.
EX 3	7/20/2004 4/12/2006	Dr. Spitz	B, BCR	2		Negative.

* A-A-reader; B-B-reader; BCR – Board Certified Radiologist; BCP – Board-Certified Pulmonologist; BCI – Board-Certified Internal Medicine; BCI(P) – Board-Certified Internal Medicine with Pulmonary Medicine sub-specialty. Readers who are Board-certified radiologists and/or B-readers are classified, as the most qualified. *See*

[6] In the absence of evidence to the contrary, compliance with the requirements of Appendix A shall be presumed. 20 C.F.R. § 718.102(e) (effective Jan. 19, 2001).

[7] *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995) at 310, n. 3. "A "B-reader" is a physician, often a radiologist, who has demonstrated proficiency in reading X-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51. Courts generally give greater weight to X-ray readings performed by "B-readers." *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 n.16, 98 L.Ed. 2d 450 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993)."

Mullins Coal Co. v. Director, OWCP, 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987) and *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B-readers need not be radiologists.

**The existence of pneumoconiosis may be established by chest X-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest X-ray classified as category "0," including subcategories "0/-, 0/0, 0/1," does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp*., 6 B.L.R. 1-307 (1983)(Under Part 727 of the Regulations) and *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 (June 19, 1997)(*en banc*)(*Unpublished*). If no categories are chosen, in box 2B(c) of the X-ray form, then the X-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

B. Pulmonary Function Studies[8]

Pulmonary Function Studies ("PFS") are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV1) and maximum voluntary ventilation (MVV).

Physician Date Exh. #	Age Height	FEV1	MVV	FVC	Tracings	Comprehension Cooperation	Qualify* Conform**
Dr. Rasmussen 2/18/2004 DX 11	48 68"	2.94	104	3.82	Yes	Good Good	No Yes
Dr. Zaldivar 6/9/2004 DX 13	48 69"	2.93 2.91+		3.76 3.84+	Yes	Good Fair	No, No Yes, Yes

+ Results after the use of bronchodilators.

* A "**qualifying**" pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.

** A study "**conforms**" if it complies with applicable standards (found in 20 C.F.R. § 718.103(b) and (c)). (*See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 (7th Cir. 1993)). A judge may infer in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP*, 6 B.L.R. 1-1083 (1984). A study which is not accompanies by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984).

Appendix B (Effective Jan. 19, 2001) states "(2) the administration of pulmonary function tests shall conform to the following criteria: (i) Tests shall not be performed during or soon after an acute respiratory illness…"

[8] § 718.103(a)(Effective for tests conducted after Jan. 19, 2001 (See 718.101(b)), provides: "Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of flow versus volume (flow-volume loop)." 65 Fed. Reg. 80047 (Dec. 20, 2000).

Appendix B (Effective Jan. 19, 2001), (2)(ii)(G): Effort is deemed "unacceptable" when the subject "[H]as an excessive variability between the three acceptable curves. The variation between the two largest FEV1's of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater. As individuals with obstructive disease or rapid decline in lung function will be less likely to achieve the degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits. Failure to meet this standard should be clearly noted in the test report by the physician conducting or reviewing the test." (Emphasis added).

For a miner of the claimant's height of 68.5 inches, § 718.204(b)(2)(i) requires an FEV1 equal to or less than 2.13 for a male 48 years of age.[9] If such an FEV1 is shown, there must be in addition, an FVC equal to or less than 2.68 or an MVV equal to or less than 85; or a ratio equal to or less than 55% when the results of the FEV1 tests are divided by the results of the FVC test.

C. Arterial Blood Gas Studies[10]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O2) compared to carbon dioxide (CO2) in the blood, expressed in percentages, indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

Date Exh. #	Physician	PCO2	PO2	Qualify
2/18/2004 DX 11	Dr. Rasmussen	37 36*	70 51*	No No
6/9/2004 DX 13	Dr. Zaldivar	35 28*	93 64*	No Yes

* Results, if any, after exercise. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b).

Appendix C to Part 718 (Effective Jan. 19, 2001) states: "Tests shall not be performed during or soon after an acute respiratory or cardiac illness."

D. Physicians' Reports[11]

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(A)(4). Where total disability

[9] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This is particularly true when the discrepancies may affect whether or not the tests are "qualifying." *Toler v. Eastern Associated Coal Co.*, 42 F.3d 3 (4th Cir. 1995). I find the miner is 68.5" here, his average reported height.

[10] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.

20 C.F.R. § 204(b)(2) permits the use of such studies to establish "total disability." It provides:

In the absence of contrary probative evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii) or (iv) of this section shall establish a miner's total disability:…

(2)(ii) Arterial blood gas tests show the values listed in Appendix C to this part…

[11] *Dempsey v. Sewell Coal Co. & Director, OWCP*, ___ B.L.R. ___, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004). Under (new) 2001 regulations, expert opinions must be based on admissible evidence.

cannot be established, under 20 C.F.R. § 718.204(b)(2)(i) through (iii), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

Dr. Rasmussen, a B-reader and Board-certified in internal medicine and forensic medicine, examined Claimant on February 18, 2004. (DX 11). Dr. Rasmussen noted a twenty year coal mine employment. He also stated that Claimant started smoking in 1975 and is a current smoker of about a ½ pack of cigarettes per day. He listed Claimant's symptoms as sputum, wheezing, dyspnea, cough, hemoptysis chest pain, two-pillow orthopnea, ankle adema and paroxysmal nocturnal dyspnea.

Based on the miner's coal mine employment and chest X-ray, Dr. Rasmussen diagnosed coal workers' pneumoconiosis. He also diagnosed Claimant with chronic bronchitis. He stated that coal mine dust exposure and cigarette smoking caused Claimant's chronic bronchitis. (DX 11).

In discussing the severity of Claimant's impairment, Dr. Rasmussen stated "[H]e does not retain the pulmonary capacity to perform his last regular coal mine job." He concluded that both cigarette smoking and coal dust exposure cased the impairment. Dr. Rasmussen stated "[T]he patient's coal mine dust exposure is at least a major contributing factor." (DX 11).

Dr. Zaldivar, a B-reader and Board-certified in pulmonary diseases, internal medicine and sleep disorders, examined Claimant on June 9, 2004. (DX 13). Dr. Zaldivar also reviewed Dr. Rasmussen's examination report. Claimant communicated to Dr. Zaldivar that he has shortness of breath, daily cough and occasional wheezing. He listed that Claimant currently smokes a half a pack of cigarettes per day. Dr. Zaldivar noted a 20 year coal mine employment. (DX 13).

Dr. Zaldivar concluded "[Claimant] may have radiographic pneumoconiosis but he does not have any dust disease of the lungs." He explained that the pattern of Claimant's abnormality is not consistent with coal workers' pneumoconiosis. He found Claimant severely impaired due to pulmonary fibrosis. Dr. Zaldivar noted that such condition is unrelated to his coal mine employment. He stated that smoking is a cause of pulmonary fibrosis. Dr. Zaldivar found Claimant unable to perform his prior coal mine work. (DX 13).

Dr. Zaldivar was deposed on April 18, 2006. (EX 5). At his prior examination, Claimant communicated to Dr. Zaldivar that he had to sleep with his head elevated on three pillows, that his mouth was dry in the morning, he snored and that he was very drowsy in the daytime. Dr. Zaldivar explained that all of these symptoms are consistent with obstructive sleep apnea caused by weight gain. Dr. Zaldivar clarified that obstructive sleep apnea has no connection to his occupation. (EX 5, p. 11).

Dr. Zaldivar testified that Claimant's breathing tests revealed a mild restriction. He stated that the blood gases performed represent a disabling pulmonary impairment. Dr. Zaldivar found no evidence of an obstructive impairment. (EX 5, p. 17).

In explaining his findings, Dr. Zaldivar stated: "he does have a disease, but it's not due to dust. It is due to something else. So whatever is present radiographically, whether it's pneumoconiosis or not, the disease that he has physiologically is not due to pneumoconiosis." (EX 5, p. 19).

On the issue of whether Claimant has coal workers' pneumoconiosis, Dr. Zaldivar stated "[I]n my opinion, he does not have coal workers' pneumoconiosis as a disease entity." (EX 5, p. 27).

Dr. Castle, a B-reader and Board-certified in internal medicine and pulmonary diseases, reviewed Claimant's medical records. (EX 1). Dr. Castle noted a twenty year coal mine employment and that Claimant is a current smoker. He accurately summarized the medical evidence in the record. After reviewing all of the evidence, Dr. Castle concluded that Claimant does not have coal workers' pneumoconiosis. Dr. Castle found no evidence of an interstitial pulmonary process. He explained that Claimant did not have "consistent findings of rales, crackles or crepitations." (EX 1).

Dr. Castle also stated that Claimant did not have radiographic evidence of coal workers' pneumoconiosis. He stated "[I]t is possible that there are some increased markings present due to his tobacco smoking habit." (EX 1).

Dr. Castle noted a reduction in Claimant's diffusing capacity. He explained that this is consistent with a tobacco smoke induced lung disease, not coal workers' pneumoconiosis. (EX 1). Dr. Castle noted that the resting arterial blood gases were normal, but the exercise tests showed an abnormality. He opined that the oxygen tension with exercise was the result of the diffusion abnormality due to his tobacco smoking habit. He stated "[I]t is my opinion that this disabling blood gas transfer mechanism is not due to a coal mine dust induced lung disease or coal workers' pneumoconiosis." (EX 1).

In conclusion, Dr. Castle found that Claimant does not have coal workers' pneumoconiosis. He also determined that Claimant is totally disabled as a result of his cigarette smoking history. (EX 1).

Dr. Castle was deposed on April 14, 2006. (EX 4). Dr. Castle explained that Dr. Rasmussen's pulmonary function study revealed a mild degree of airway obstruction. He stated that did not reveal a restriction. He noted that Dr. Zaldivar's study revealed a mild obstruction and a significant reduction in the diffusion capacity. He also explained that arterial blood gases revealed a significant degree of exercise induced hypoxemia. (EX 4, pp. 10-11). Dr. Castle concluded that these tests resulted in respiratory bronchiolitis interstitial lung disease. He explained that this condition is seen in men who are significant tobacco smokers. He stated that with this condition some interstitial lung disease may be seen radiographically. (EX 4, p. 12).

III. Witness' Testimony

Claimant testified on his behalf at the May 11, 2006 hearing. (TR 8). Claimant testified that his last day of employment was July 12, 2002 at K. B. Concrete. He was last employed in the coal mine industry in 1999. He worked four months for Lightening Contract Services; prior to that he worked for Copperas Coal Corporation. Claimant was employed by Copperas Coal Corporation for three to four years. Claimant was a roof bolter in the coal mines. (TR 10-11).

Claimant testified that he has been smoking for about thirty years. He currently smokes about a half a pack of cigarettes per day. (TR 13).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of the evidence, that: (1) he has pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; and, (3) he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202-718.205; *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and *Perry v. Director, OWCP,* 9 B.L.R. 1-1 (1986). *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997). The claimant bears the burden of proving each element of the claim by a preponderance of the evidence, except insofar as a presumption may apply. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1320 (3rd Cir. 1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). Moreover, "[T]he presence of evidence favorable to the claimant or even a tie in the proof will not suffice to meet that burden." *Eastover Mining Co. v. Director, OWCP [Williams]*, 338 F.3d 501, No. 01-4604 (6th Cir. July 31, 2003), *citing Greenwich Collieries [Ondecko]*, 512 U.S. 267 at 281; *see also Peabody Coal Co. v. Odom*, ___ F.3d ___, 2003 WL 21998333 (6th Cir. Aug. 25, 2003)(Credit treating physician on more than mere status).

Since this is the claimant's second claim for benefits, and it was filed on or after January 19, 2001, it must be adjudicated under the new regulations.[12] Although the new regulations

[12] Section 725.309(d)(For duplicate claims filed on or after Jan. 19, 2001)(65 Fed. Reg. 80057 & 80067):

(d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subpart E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see Section 725.202(d)(miner), 725.212(spouse), 725.218(child), and 725.222(parent, brother or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that he individual

dispense with the "material change in conditions" language of the older regulations, the criteria remain similar to the "one-element" standard set forth by the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), which was adopted by the United States Court of Appeals for the Fourth Circuit, in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc) rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997). In *Dempsey v. Sewell Coal Co. & Director, OWCP*, ___ B.L.R. ___, BRB Nos. 03-0615 BLA an d03-0615 BLA-A (June 28, 2004), the Board held that where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement…has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. Section 725.309(d); *White v. New White Coal Co.*, *Inc.*, 23 B.L.R. 1-1, 1-3 (2004). According to the Board, the "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. Section 725.309(d)(2).

To assess whether a material change in conditions is established, the Administrative Law Judge must consider all of the new evidence, favorable and unfavorable, and determine whether the claimant has proven, at least one of the elements of entitlement previously adjudicated against him in the prior denial of August 31, 2001, i.e., total disability. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.*, 117 S.Ct. 763 (1997); *Sharondale Corp v. Ross*, 42 F.3d 993 (6th Cir. 1994); and *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 B.L.R. 2-76 (3rd Cir. 1995). *See Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Unlike the Sixth Circuit in *Sharondale*, the Fourth Circuit does not require consideration of the evidence in the prior claim to determine whether it "differ[s] qualitatively" from the new evidence. *Lisa Lee Mines,* 86 F.3d at 1363, n.11. The Administrative Law Judge must then consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) and *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995).

In *Caudill v. Arch of Kentucky, Inc.*, 22 B.R.B. 1-97, BRB No. 98-1502 (Sept. 29, 2000)(*en banc on recon.)*, the Benefits Review Board held the "material change" standard of section 725.309 "requires an adverse finding on an element of entitlement because it is necessary

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was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see §725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

(5) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

to establish a baseline from which to gauge whether a material change in conditions has occurred." Unless an element has previously been adjudicated against a claimant, "new evidence cannot establish that a miner's condition has changed with respect to that element." Thus, in a claim where the previous denial only adjudicated the matter of the existence of the disease, the issue of total disability "may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions…"

The claimant's first application for benefits was denied because the evidence failed to show that the claimant was totally disabled. Under the *Sharondale* standard, the claimant must show the existence of one of these elements by way of newly submitted medical evidence in order to show that a material change in condition has occurred. If he can show that a material change has occurred, then the entire record must be considered in determining whether he is entitled to benefits.

As discussed below, I find that Claimant is now totally disabled due to a respiratory impairment. Thus, the evidence of the first claim is considered in determining whether Claimant is entitled to benefits.

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[13] 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R § 718.201.[14]

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[13] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director,* 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1362; *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995) at 314-315. In *Henley v. Cowan and Co.*, 21 B.L.R. 1-148 (May 11, 1999), the Board holds that aggravation of a pulmonary condition by dust exposure in coal mine employment must be "significant and permanent" in order to qualify as CWP, under the Act. In *Workman v. Eastern Associated Coal Corp*., 23 B.L.R. 1-22, BRB No. 02-0727 BLA (Aug. 19, 2004)(order on recon)(*en banc*) the Board ruled that because the potential for progressivity and latency is inherent in every case, a miner who proves the presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it was previously not, has demonstrated that the disease from which he suffers is of a progressive nature. In amending section 718.201, DOL concluded chronic dust diseases of the lung and its sequelae arising out of coal mine employment "may be latent and progressive, albeit in a minority of cases." *See* 64 Fed. Reg. 54978-79 (Oct. 8, 1999); 65 Fed. Reg. 79937-44, 79968-72 (Dec. 20, 2000); 68 Fed. Reg. 69930-31 (Dec. 15, 2003). "Although every case of pneumoconiosis does not possess these characteristics, the regulation was designed to prevent operators from asserting that pneumoconiosis is never latent and progressive. 20 C.F.R. Section 718.201(c); *see National Mining Association, et al. v. Chao, Sec. of Labor*, 160 F.Supp.2d 47 (D.D.C. Aug. 9, 2001) *aff'd,* 292 F.3d 849 (D.C. Cir. 2002)("NMA"), 292 F.3d at 863." *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486 (7th Cir. 2004). Seventh Circuit upheld DOL's 2001 definition of CWP as a latent and progressive disease. DOL's regulation, on this scientific finding is entitled to deference. It is designed to prevent operators from claiming CWP is never latent and progressive.

[14] Regulatory amendments, effective January 19, 2001, state:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis,

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[15] Thus, "pneumoconiosis", as defined by the Act, has a much broader legal meaning than does the medical definition.

"…[T]his broad definition 'effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines.'" *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-78, 914 F.2d 35 (4th Cir. 1990) *citing Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938 (4th Cir. 1980).

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis, if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 14 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995) and *see* § 718.201(a)(2).

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest X-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a)(1); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebutable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound

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(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal Pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.
(Emphasis added).

[15] The definition of pneumoconiosis, in 20 C.F.R. section 718.5201, does not contain a requirement that "coal dust specific diseases…attain the status of an "impairment" to be so classified. The definition is satisfied "whenever one of these diseases is present in the miner at a detectable level; whether or not the particular disease exists to such an extent as to become compensable is a separate question." Moreover, the legal definition of pneumoconiosis "encompasses a wide variety of conditions; among those are disease whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nevertheless been made worse by coal dust exposure. *See e.g., Warth*, 60 F.3d at 175." *Clinchfield Coal v. Fuller*, 180 F.3d 622 (4th Cir. June 25, 1999) at 625.

judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion.[16] 20 C.F.R. § 718.202(a)(4).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers' pneumoconiosis. This is contrary to the Board's view that an administrative law judge may weigh the evidence under each subsection separately, i.e. X-ray evidence at § 718.202(a)(1) is weighed apart from the medical opinion evidence at § 718.202(a)(4). In so holding, the court cited to the Third Circuit's decision in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 24-25 (3rd Cir. 1997) which requires the same analysis.

The claimant cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable to a living miner's claim filed after January 1, 1982, with no evidence of complicated pneumoconiosis.

A finding of the existence of pneumoconiosis may be made with positive chest X-ray evidence. 20 C.F.R. § 718.202(a)(1). The correlation between "physiologic and radiographic abnormalities is poor" in cases involving CWP. "[W]here two or more X-ray reports are in conflict, in evaluating such X-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." *Id.*; *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985)." (Emphasis added). (Fact one is Board-certified in internal medicine or highly published is not so equated). *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31 91991) at 1-37. Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-231, n.5 (1985).

Interpretations of three chest X-rays were submitted in the current claim. The X-rays are dated February 18, 2004, June 9, 2004 and July 20, 2004. The February 18, 2004 X-ray was interpreted by two dually qualified physicians. One physician interpreted the X-ray as positive and the other physician interpreted the X-ray as negative. Due to the equal qualifications of the physicians and conflicting readings, I find the February 18, 2004 X-ray to be in equipoise.

The June 9, 2004 X-ray was read by a dually-qualified physician and a B-reader as negative for coal workers' pneumoconiosis. As there are no conflicting interpretations, I find the June 9, 2004 X-ray negative for coal workers' pneumoconiosis.

The most recent X-ray is dated July 20, 2004. This X-ray was interpreted by four dually-qualified physicians. Two physicians interpreted the X-ray as positive and two physicians

[16] In accordance with the Board's guidance, I find each medical opinion documented and reasoned, unless otherwise noted. *Collins v. J & L Steel,* 21 B.L.R. 1-182 (1999) *citing Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); and, *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 21 B..R. 2-269 (4th Cir. 1997). This is the case, because except as otherwise noted, they are "documented" (medical), i.e., the reports set forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis and "reasoned" since the documentation supports the doctor's assessment of the miner's health.

interpreted the X-ray as negative for coal workers' pneumoconiosis. Due to the equal qualifications of the physicians and conflicting readings, I also find the July 20, 2004 X-ray to be in equipoise.

In summary, the June 9, 2004 X-ray is negative for coal workers' pneumoconiosis and the February 18, 2004 and July 20, 2004 X-rays neither prove nor disprove the existence of coal workers' pneumoconiosis.

In the miner's first application for benefits, chest X-rays dated January 8, 1999 and July 7, 1999 were submitted into evidence. The January 8, 1999 X-ray was interpreted by two dually-qualified physicians as positive for coal workers' pneumoconiosis. Additionally, three dually-qualified physicians interpreted such X-ray as negative for coal workers' pneumoconiosis. The July 7, 1999 X-ray was interpreted by a B-reader as negative for coal workers' pneumoconiosis.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative X-ray, 20 C.F.R. § 718.202(a).

Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical opinions as contemplated by the Regulations. *Justice v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). However, where the physician's report, although documented, fails to explain how the documentation supports its conclusions, an Administrative Law Judge may find the report is not a reasoned medical opinion. *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984). A medical opinion shall not be considered sufficiently reasoned if the underlying objective medical data contradicts it.[17] *White v. Director, OWCP*, 6 B.L.R. 1-368 (1983).

As discussed above, Drs. Rasmussen, Zaldivar and Castle provided opinions regarding the miner's condition. Dr. Rasmussen concluded that Claimant has coal workers' pneumoconiosis. Dr. Rasmussen, however, provided minimal explanation of this finding. He explained that he bases his finding on coal dust exposure and a positive chest X-ray. At a later date, the X-ray relied upon by Dr. Rasmussen was interpreted as negative for coal workers' pneumoconiosis by a dually-qualified physician. It is, therefore, unclear if Dr. Rasmussen's opinion would change if he reviewed both the positive and the negative X-ray interpretation by equally qualified physicians. As such, I find that Dr. Rasmussen's opinion is not well reasoned and, thus, entitled to little weight.

Dr. Zaldivar stated that Claimant "may have" pneumoconiosis by radiographic evidence, but that he does not have a dust disease. He went on to diagnose pulmonary fibrosis and sleep

[17] *Fields v. Director, OWCP*, 10 B.L.R. 1-19, 1-22 (1987). "A 'documented' (medical) report sets forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis. A report is 'reasoned' if the documentation supports the doctor's assessment of the miner's health. *Fuller v. Gibraltor Coal Corp.*, 6 B.L.R. 1-1291 (1984)…" In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, Case No. 99-3469, 22 B.L.R. 2-107 (6th Cir. Sept. 7, 2000), the court held if a physician bases a finding of CWP only upon the miner's history of coal dust exposure and a positive X-ray, then the opinion should not count as a reasoned medical opinion, under 20 C.F.R. § 718.202(a)(4).

apnea, neither caused by coal dust exposure. At his deposition, Dr. Zaldivar stated that there is no coal workers' pneumoconiosis "as a disease entity." I find Dr. Zaldivar's statements regarding pneumoconiosis to be unclear and inconclusive. Thus, due to the uncertainty of his conclusions, I find his opinion entitled to little weight.

Dr. Castle concluded that Claimant does not have coal workers' pneumoconiosis. He diagnosed Claimant with respiratory bronchiolitis interstitial lung disease. He explained that this is caused by cigarette smoking, not coal dust exposure. He noted that Claimant did not have the rales, crackles or crepitations consistent with pneumoconiosis. He also noted that the reduction in Claimant's diffusion capacity is consistent with a smoking induced lung disease. I find that Dr. Castle provided a well-reasoned and well-supported opinion. Thus, I find his opinion entitled to greater weight than the opinions of Drs. Rasmussen and Zaldivar.

Drs. Rasmussen and Zaldivar also submitted opinions in the miner's first claim for benefits. Dr. Rasmussen diagnosed coal workers' pneumoconiosis based upon coal dust exposure and a positive chest X-ray. Dr. Zaldivar concluded that Claimant does not have coal workers' pneumoconiosis.

After reviewing the chest X-ray evidence and the physician opinions submitted in the current claim for benefits, I find the Claimant has not met his burden of proof in establishing the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) *aff'g sub. Nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 B.L.R. 2-64 (3rd Cir. 1993). Additionally, after reviewing the evidence submitted in the miner's first claim for benefits in combination with the current evidence, I also find that Claimant did not prove the existence of coal workers' pneumoconiosis by a preponderance of the evidence.

C. Cause of Pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b). If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c).

Since the miner had ten years or more of coal mine employment, the claimant would ordinarily receive the benefit of the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. However, in view of my finding that the existence of CWP has not been proven the issue is moot. Moreover, the presumption is rebutted by the medical opinion evidence discussed herein.

D. Existence of total disability due to pneumoconiosis

The claimant must show his total pulmonary disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(b).[18] Section 718.204(b)(2)(i) through (b)(2)(iv) and (d) set forth criteria to establish total disability: (i) pulmonary function studies with qualifying values; (ii) blood gas studies with qualifying values; (iii) evidence that miner has pneumoconiosis and suffers from cor pulmonale with right-side congestive heart failure; (iv) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment and gainful employment requiring comparable abilities and skills; and lay testimony. Under this subsection, the Administrative Law Judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If it does, the Administrative Law Judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *see also Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986), *aff'd on reconsideration en banc,* 9 B.L.R. 1-236 (1987).

Section 718.204(b)(2)(iii) is not applicable because there is no evidence that the claimant suffers from cor pulmonale with right-sided congestive heart failure. Section 718.204(d) is not applicable because it only applies to a survivor's claim or deceased miners' claim in the absence of medical or other relevant evidence.

Section 718.204(b)(2)(i) provides that a pulmonary function test may establish total disability if its values are equal to or less than those listed in Appendix B of Part 718. As noted above, the record contains pulmonary function studies performed on February 18, 2004 and June 9, 2004. Neither of the studies revealed qualifying results. Therefore, Claimant did not prove total disability through pulmonary function studies.

In the miner's prior claim for benefits, he submitted pulmonary function studies dated January 8, 1999 and July 7, 1999. Neither study revealed qualifying results.

Claimants may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(b)(2)(ii). A resting arterial blood gas was performed on February 18, 2004. This study did not reveal qualifying results. On June 9, 2004, a resting study and an exercise study were performed. The resting arterial blood gas study was non-qualifying. The exercise study, however, did reveal qualifying

[18] The Board has held it is the claimant's burden to establish total disability due to CWP by a preponderance of the evidence. *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986)(*en banc*).

20 C.F.R. § 718.204 (Effective Jan. 19, 2001). Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis, states:
(a) General. Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease shall be considered in determining whether a miner is or was totally disabled due to pneumoconiosis.

results. Although a preponderance of the studies are non-qualifying, the exercise study reveals a level of impairment.

In the first application for benefits, arterial blood gases were performed on January 8, 1999 and July 7, 1999. The resting arterial blood gases on both dates were non-qualifying. The exercise studies, however, were both qualifying.

Finally, total disability may be demonstrated, under § 718.204(b)(2)(iv), if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition presents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable or gainful work. § 718.204(b). Under this subsection, "…all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing, by a preponderance of the evidence, the existence of this element." *Mazgaj v. Valley Coal Company*, 9 B.L.R. 1-201 (1986) at 1-204. The fact finder must compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993). Once it is demonstrated that the miner is unable to perform his usual coal mine work a *prima facie* finding of total disability is made and the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party opposing entitlement, as defined pursuant to 20 C.F.R § 718.204(b)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

As previously stated, Drs. Rasmussen, Zaldivar and Castle rendered opinions in the current claim. All three physicians agree that Claimant has a total pulmonary disability and would not be able to return to his prior coal mine employment.

In the prior claim for benefits, Dr. Rasmussen referred to Claimant's "disabling respiratory insufficiency." He did not, however, state whether Claimant was totally disabled to the extent that he could not return to his prior coal mine employment. Dr. Zaldivar concluded that Claimant did not have a totally disabling respiratory impairment.

In considering the evidence submitted in the current claim, I find the claimant has met his burden of proof in establishing the existence of total disability. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994), *aff'g sub. nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 B.L.R. 2-64 (3rd Cir. 1993). I find that the physician opinions are entitled to the greatest weight in determining whether Claimant is totally disabled. The physicians adequately compared the strenuous nature of coal mine employment to the Claimant's level of impairment in determining whether Claimant could return to such work. Thus, despite the non-qualifying pulmonary function studies and arterial blood gas studies, I find that Claimant has proven the existence of a totally disabling respiratory impairment by the physician opinions rendered.

I also find that the evidence submitted in the current claim is more indicative of Claimant's current level of impairment than the evidence submitted in the Claimant's first application for benefits. Thus, after reviewing the evidence from both claims, I find Claimant has proven the existence of a totally disabling respiratory impairment.

E. Cause of total disability

The revised regulations, 20 C.F.R. § 718.204(c)(1), requires a claimant to establish his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary disability. The January 19, 2001 changes to 20 C.F.R. § 718.204(c)(1)(i) and (ii), adding the words "material" and "materially", results in "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. No. 245, 7999946 (Dec. 20, 2000).

As stated above, I find that Claimant has not proven the existence of coal workers' pneumoconiosis. Therefore, the issue of disability causation is moot. Furthermore, there is evidence that Claimant's disability is due to a cigarette smoking induced lung disease.

ATTORNEY FEES

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

CONCLUSIONS

In conclusion, the claimant has established that a material change in conditions has taken place since the previous denial, because he has established the existence of a totally disabling respiratory impairment. The claimant does not have pneumoconiosis, as defined by the Act and Regulations. The claimant is totally disabled. His total disability is not due to pneumoconiosis. He is therefore not entitled to benefits.

ORDER[19]

It is ordered that the claim of R. W. B. for benefits under the Black Lung Benefits Act is hereby DENIED.

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RICHARD A. MORGAN
Administrative Law Judge

[19] Section 725.478 Filing and service of decision and order (Change effective Jan. 19, 2001). Upon receipt of a decision and order by the DCMWC, the decision and order shall be considered to be filed in the office of the district director, and shall become effective on that date.

NOTICE OF APPEAL RIGHTS (Effective Jan. 19, 2001): Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board before the decision becomes final, i.e., at the expiration of thirty (30) days after "filing" (or **receipt by**) with the Division of Coal Mine Workers' Compensation, OWCP, ESA, ("DCMWC"), by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601.**[20] At the time you file an appeal with the Board, you **must also send a copy** of the appeal letter to **Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210**. *See* 20 C.F.R. § 725.481.

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

E-FOIA Notice: Under e-FOIA, final agency decisions are required to be made available via telecommunications, which under current technology is accomplished by posting on an agency web site. *See* 5 U.S.C. § 552(a)(2)(E). *See also* Privacy Act of 1974; Publication of Routine Uses, 67 Fed. Reg. 16815 (2002) (DOL/OALJ-2). Although 20 C.F.R. § 725.477(b) requires decisions to contain the names of the parties, it is the policy of the Department of Labor to avoid use of the Claimant's name in case-related documents that are posted to a Department of Labor web site. Thus, the final ALJ decision will be referenced by the Claimant's initials in the caption and only refer to the Claimant by the term "Claimant" in the body of the decision. If an appeal is taken to the Benefits Review Board, it will follow the same policy. This policy does not mean that the Claimant's name or the fact that the Claimant has a case pending before an ALJ is a secret.

[20] 20 C.F.R. § 725.479 (Change effective Jan. 19, 2001). (d) Regardless of any defect in service, **actual receipt** of the decision is suffice to commence the 30-day period for requesting reconsideration or appealing the decision.